

conviction has been imposed.

3. An attack by a prisoner on a federal conviction and/or sentence is typically made by means of 28 U.S.C. §2255, which provides for relief from custody for a petitioner who makes a constitutional attack on the imposition (and not the execution) of a federal conviction and/or a federal sentence, such attack being made after the imposition of the federal sentence.⁴

4. Petitioner filed a petition seeking relief pursuant to 28 U.S.C. §2255 on December 18, 2007; in this petition, he claims that he was convicted on January 11, 1999 in the Court of Common Pleas of Philadelphia County; he says that the sentence imposed by that court was “9 to 23 months;” petitioner also claims that he is currently in federal custody.

5. Pursuant to the language of the AEDPA statutes themselves, a prisoner seeking to bring either a §2254 habeas, or a §2255 habeas, must be “in custody” **at the time the habeas is filed**.⁵ The concept of being “in custody” means that a person is subject to **both**:

- I. significant restraints on liberty which are not shared by the public generally; **and**

⁴Where there is an attack on a federal conviction which does not involve a Constitutional argument, there is no right to habeas corpus relief, and the proper remedy lies in a request for a new trial pursuant to Federal Rule of Criminal Procedure 33. Ruiz v. USA, 221 F.Supp. 2d 66 (D.Mass. 2002), aff’d, 339 F.3d 39 (1st Cir. 2003). Where there is an attack on a federal sentence which does not involve a Constitutional argument, there is not right to habeas corpus relief, and the proper remedy lies in a request for a new sentence pursuant to Federal Rule of Criminal Procedure 35. USA v. Canino, 212 F.3d 383 (7th Cir. 2000).

⁵Spencer v. Kemna, 523 U.S. 1 (1998).

II. some type of continuing governmental supervision.⁶

6. In the instant petition, it is impossible for this court to determine how petitioner could still consider himself to be in custody for a “9 to 23 month” sentence apparently imposed in 1999. It is also impossible for this court to determine why petitioner is currently in federal custody. It is also impossible for this court to determine why petitioner believes an apparent attack on the aforesaid 1999 state conviction impacts on his apparent current federal custody.

Accordingly, this Day of 200 ,

it is hereby **ORDERED** as follows.

1. Leave is granted for petitioner to proceed in forma pauperis, for the purpose of all proceedings in this court, and also for the purpose of filing a notice of appeal.
2. The Clerk of Court shall furnish petitioner with a blank copy of this court’s current standard form for filing a petition pursuant to 28 U.S.C. §2254 (bearing the above-captioned civil action number). The Clerk of Court shall also furnish petitioner with a blank copy of this court’s current standard form for filing a petition pursuant to 28 U.S.C. §2255 (bearing the above-captioned civil action number).
3. Petitioner shall notify this court within thirty (30) days whether he wishes that 07-cv-5323 proceed as a 28 U.S.C. §2255 petition or as a 28 U.S.C. §2254 petition (and if so, petitioner shall explain why he wishes it to so proceed). If petitioner wishes 07-cv-5323 to proceed as a 28 U.S.C. §2254 petition, he shall complete the enclosed 28 U.S.C. §2254 form and return it to this court. If petitioner wishes 07-cv-5323 to proceed as a 28 U.S.C. §2255 petition, he shall complete the enclosed 28 U.S.C. §2255 form (including information as to how he came to be in federal custody) and return it to this court.

⁶Obado v. New Jersey, 328 F.3d 716 (3rd Cir. 2003). Accord, Kumarasamy v. Attorney General of the United States, 453 F.3d 169 (3rd Cir. 2006); Jordon v. Attorney General of the United States, 424 F.3d 320 (3rd Cir. 2005); Barry v. Bergen County Probation Dept., 128 F.3d 152 (3rd Cir. 1997).

4. Petitioner is formally placed on notice that if he does not provide an answer to the questions raised in this Memorandum and Order within thirty (30) days, then 07-cv-5323 will be dismissed without prejudice.

S/ ANITA B. BRODY

ANITA B. BRODY, U.S. District Judge